No. 20-1138

In the Supreme Court of the United States

CIMZNHCA, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, permits a private party (known as a "relator") to file a civil action "in the name of the Government" to redress certain wrongs done to the United States. 31 U.S.C. 3730(b)(1). The FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). The questions presented are as follows:

1. Whether the court of appeals had appellate jurisdiction to review the district court's denial of the United States' motion to dismiss petitioner's FCA suit.

2. Whether the court of appeals correctly reversed the district court's denial of the motion to dismiss.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 970 F.3d 835. The opinion and order of the district court denying the United States' motion to dismiss this case is not published in the Federal Supplement but is available at 2019 WL 1598109. The district court's opinion and order denying the United States' motion to alter or amend the court's earlier order (Pet. App. 39a-43a) is not published in the Federal Supplement but is available at 2019 WL 2409576.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2020. A petition for rehearing was denied on September 17, 2020 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on February 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a)(1).

The FCA permits private parties, known as relators, to bring suit "in the name of the Government" against persons who have knowingly defrauded the United States. 31 U.S.C. 3730(b)(1). When such a "*qui tam*" action is filed, the government may intervene to litigate the case. See 31 U.S.C. 3730(b)(2). If the government declines to intervene, the relator may conduct the litigation, although the United States remains a "real party in interest." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (citation omitted); see 31 U.S.C. 3730(b)(4)(B). In either event, the relator receives a share of any proceeds recovered through the litigation. 31 U.S.C. 3730(d). Every FCA action is premised on an alleged legal wrong done to the United States, and the statute can "be regarded as effecting a partial assignment [to the relator] of the Government's damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

The Act establishes several mechanisms for the Executive Branch to maintain control over an FCA suit, even when the government initially declines to intervene in the action. The government may intervene later

"upon a showing of good cause." 31 U.S.C. 3730(c)(3). The government may prevent a relator from dismissing the action, 31 U.S.C. 3730(b)(1), and it may "settle the action with the defendant notwithstanding the objections" of a relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," 31 U.S.C. 3730(c)(2)(B). As relevant here, the FCA also provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).

2. Petitioner is one of "eleven daughter companies" formed by a company called Venari Partners, each "for the single purpose of prosecuting a separate qui tam action" premised on "essentially identical [FCA] violations" allegedly committed by "dozens of defendants in the pharmaceutical and related industries across the country." Pet. App. 3a-4a. In July 2017, petitioner filed this *qui tam* suit, alleging that the defendants had defrauded the federal government and multiple state governments by illegally paying physicians kickbacks for prescribing or recommending Cimzia, a drug used to treat Crohn's disease. See *ibid.*; D. Ct. Doc. 2 (July 20, 2017) (complaint). Petitioner alleged that, in exchange for prescribing Cimzia, the defendants had provided physicians and their patients with free product education, instruction, and "reimbursement support services"—assistance for doctors in obtaining reimbursement from insurance providers for Cimzia. Pet. App. 4a.

The United States declined to intervene in petitioner's action. D. Ct. Doc. 19 (Dec. 14, 2017). About a year later, the United States moved to dismiss the suit under Section 3730(c)(2)(A), as it did in the other ten *qui tam* suits in which petitioner's sister companies had made similar allegations. D. Ct. Docs. 63, 64 (Dec. 17, 2018). The government's motion described in detail its "extensive investigation" into this group of FCA claims, and its conclusion "that further expenditure of government resources is not justified" because petitioner's "sweeping allegations lack adequate support." D. Ct. Doc. 64, at 14-15. The government also noted the "substantial costs" and "litigation burdens" that petitioner's action would impose on federal agencies if the suit were allowed to continue, given the "vast scope" of petitioner's allegations of fraud in Medicare and other government-healthcare programs. *Id.* at 14. In addition, the government observed that petitioner's "specific allegations in this case"—including that patient-education services are illegal kickbacks—"conflict with important policy and enforcement prerogatives of the federal government's healthcare programs," because the government has a significant interest in ensuring that "patients have access to basic product support relating to their [prescribed] medication." *Id.* at 15.

The government's motion to dismiss explained that, while courts of appeals have applied slightly different standards when considering such motions, dismissal of this case was appropriate under any of those standards. D. Ct. Doc. 64, at 9-16 (describing the analyses in *Swift* v. *United States*, 318 F.3d 250 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003), and *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999)).

After holding a hearing, D. Ct. Doc. 75 (Mar. 29, 2019), the district court denied the United States' motion to dismiss, 2019 WL 1598109. The court agreed with petitioner that the government's decision to dismiss this case was "arbitrary and capricious." *Id.* at *4. The court concluded that the government had not "fully investigate[d] the allegations against the specific defendants in this case," but instead had "conduct[ed] a general collective investigation [of] the eleven cases filed by the [petitioner] against various defendants nationwide." *Id.* at *3. The court also faulted the government for not conducting "a cost-benefit analysis" to determine "the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed." *Ibid.* And the court expressed suspicion that "the Government's true motivation" for seeking dismissal was "animus" toward petitioner as a "'professional relator[].'" *Id.* at 4. The district court subsequently denied the government's motion to alter or amend the order denying dismissal. Pet. App. 39a-43a.

3. The court of appeals reversed and remanded with instructions to dismiss petitioner's FCA claims. Pet. App. 1a-38a.

a. The court of appeals held that it had jurisdiction over the United States' appeal from the order denying the Section 3730(c)(2)(A) motion. Pet. App. 8a-23a. While the government had argued that the collateral-order doctrine authorized an immediate appeal of the district court's order, the court of appeals "s[aw] no need to create a new category of appealable collateral orders" and declined to pass on that argument. *Id.* at 8a. Instead, the court found that, "[i]n substance, the government appeals a denial of what should be deemed

a motion to intervene and then to dismiss." *Ibid.* The court stated that "[a]n intervenor comes between the original parties to ongoing litigation and interposes between them its claim, interest, or right," and that "is exactly what the government wants to do here." *Id.* at 11a.

Indeed, the court of appeals held that the FCA *requires* the United States to intervene before seeking to dismiss a *qui tam* suit under Section 3730(c)(2)(A). Pet. App. 12a-22a.[1] The court also found it appropriate to construe the district court's order as a denial of intervention, because the district court's "conclu[sion] that the government's case for dismissal was not even rational * * * necessarily expressed [the district court's] view on the government's lack of 'good cause' to intervene under" Section 3730(c)(3). *Id.* at 23a. And because "[i]t is well established that denials of motions to intervene are appealable," the court found that it had jurisdiction to decide the government's appeal. *Id.* at 8a; see *id.* at 23a (citing *Planned Parenthood of Wis., Inc.* v. *Kaul*, 942 F.3d 793, 796-797 (7th Cir. 2019)).

b. The court of appeals' conclusion that the United States must move to intervene before seeking dismissal under Section 3730(c)(2)(A) informed its view of the appropriate standard to evaluate such dismissal requests. The court found that "[t]he standard is that provided by the Federal Rules of Civil Procedure" to govern a plaintiff's motion to dismiss, "as limited by any more specific provision of the False Claims Act and any applicable background constraints on executive conduct in general." Pet. App. 23a. The court observed that, under

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[1] The court of appeals acknowledged that this conclusion diverged from the consensus view of other circuits. See Pet. App. 12a (listing cases).

Federal Rule of Civil Procedure 41(a)(1)(A)(i), a plaintiff has an "absolute" right to dismiss an action, without court permission, before the defendant serves an answer or motion for summary judgment. Pet. App. 23a-24a. The court then reasoned that, in the context of a *qui tam* suit, that rule is supplemented by Section 3730(c)(2)(A), which authorizes the government to dismiss the case with respect to the relator as well as to itself. *Id.* at 24a. The court further observed that the only FCA limitation on the United States' ability to dismiss without the relator's consent at that stage is Section 3730(c)(2)(A)'s requirement that the relator receive notice and an opportunity for a hearing. *Ibid.*

Because the court of appeals deemed the United States to have constructively intervened in this case before an answer or summary-judgment motion was filed, and because petitioner had "received notice and took its opportunity to be heard," the court found that no provision of law further constrained the government's ability to dismiss the suit. Pet. App. 25a. The court noted that, in extraordinary circumstances, the Constitution may limit the government's power to dismiss an FCA case, and that "review for fraud on the court" might be available. *Id.* at 28a; see *id.* at 26a-28a. The court concluded, however, that "[w]herever the limits of the government's power lie, this case is not close to them." *Id.* at 28a. "At bottom," the court of appeals explained, the district court had erred by "fault[ing] the government for having failed to make a particularized dollar-figure estimate of the potential costs and benefits of [petitioner's] lawsuit, as opposed to the more general review * * * undertaken and described by the government" of the allegations made by petitioner and its sister companies. *Ibid.* The court emphasized that "[n]o constit-

utional or statutory directive" mandates such an analysis, and "[t]he government is not required to justify its litigation decisions in this way." *Ibid.*

The court of appeals also "disagree[d] with" the district court's "suggestion that the government's decision here fell short of the bare rationality standard"—a standard "borrowed * * * from substantive due process cases"—that the Ninth Circuit had adopted in *Sequoia Orange*. Pet. App. 28a-29a. The court observed that agency guidance cast doubt on petitioner's theory of liability in this case, and that the government viewed petitioner's complaint as targeting patient-support services that are "beneficial to patients and the public." *Id.* at 29a. The court further agreed with the government that petitioner and its fellow companies, which were "created as investment vehicles for financial speculators[,] should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine . . . practices the federal government has determined are . . . appropriate and beneficial to federal healthcare programs and their beneficiaries." *Ibid.* (internal quotation marks omitted).

Judge Scudder concurred in the judgment. Pet. App. 37a-38a. He agreed with "the majority's analysis of the jurisdictional question and bottom-line conclusion," but would not have addressed the standard for evaluating Section 3730(c)(2)(A) motions. *Id.* at 37a. Judge Scudder concluded that, because "the government's dismissal request easily satisfied rational basis review" under the Ninth Circuit's more relator-friendly standard, "and the district court committed error concluding otherwise," the court of appeals could and should resolve this appeal on that "narrower ground[]." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-21) that the court of appeals lacked jurisdiction to review the district court's denial of the United States' motion to dismiss, and that the court of appeals erred in reversing the district court's decision on that motion. Petitioner is wrong on both points. The court of appeals had appellate jurisdiction under the collateral-order doctrine, and the court correctly explained why the government's request to dismiss this case was amply justified.

The jurisdictional question presented here has arisen only twice since 1986 and lacks sufficient importance to warrant this Court's review. And the modest differences among the standards by which various courts of appeals have evaluated government motions to dismiss under Section 3730(c)(2)(A) likewise provide no sound basis for further review in this case. This Court recently denied a petition for a writ of certiorari raising similar arguments, *United States ex rel. Schneider* v. *JPMorgan Chase Bank*, 140 S. Ct. 2660 (2020) (No. 16-678), and the same result is appropriate here. This case would be an unsuitable vehicle to clarify the Section 3730(c)(2)(A) dismissal standard, moreover, because the court below held that petitioner's suit would be dismissed under any standard. Further review is not warranted.

1. The court of appeals had jurisdiction to entertain the government's appeal from the denial of its motion to dismiss this *qui tam* suit. The question of appellate courts' authority to review the denial of a Section 3730(c)(2)(A) motion has arisen only recently and infrequently, and it does not require this Court's resolution here.

a. The FCA provides that "[t]he Government may dismiss" a *qui tam* action "notwithstanding the objections" of a relator who initiated the lawsuit if two conditions are satisfied: (1) the relator "has been notified by the Government of the filing of the motion," and (2) "the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). Because that language imposes no substantive restrictions on the government's ability to dismiss *qui tam* actions, and thus preserves the Executive Branch's usual unfettered discretion to dismiss an action brought in the name of the United States to remedy wrongs done to the United States, denials of Section 3730(c)(2)(A) motions have been "very rare." Pet. App. 9a. Between 1986 and 2018, no court denied such a motion, and since then only two district courts (including the district court in this case) have done so. *Ibid.*; see *United States* v. *Academy Mortg. Corp.*, No. 16-cv-2120, 2018 WL 3208157, at *2-*3 (N.D. Cal. June 29, 2018), appeal dismissed *sub nom. United States ex rel. Thrower* v. *Academy Mortg. Corp.*, 968 F.3d 996 (9th Cir. 2020).

Because only two district courts have denied Section 3730(c)(2)(A) motions since 1986, only two circuits have considered the appropriate mechanisms for the United States to appeal such orders. In both those cases, the government has argued that denials of Section 3730(c)(2)(A) motions are collateral orders appealable under 28 U.S.C. 1291 because they are "conclusive" with respect to the United States' dismissal right, they "resolve [an] important question[] separate from the merits," and they are "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted); see *United States ex rel. Eisenstein*

v. *City of New York*, 556 U.S. 928, 931 n.2 (2009) (observing that the United States may, without intervening, appeal certain district-court orders addressing the government's prerogatives under the Act). The United States' right to terminate a *qui tam* action over the relator's objection could not be vindicated after a suit has proceeded to its conclusion. And a district court's intrusion on the government's wide latitude to achieve dismissal of FCA suits that it views as counter-productive implicates the type of "compelling public ends" involving the "separation of powers" that warrant a collateral-order appeal. *Will* v. *Hallock*, 546 U.S. 345, 352 (2006) (citations omitted).

b. Although the court of appeals recognized that it had jurisdiction to review the district court's denial of the government's motion to dismiss, the court did not base its jurisdictional ruling on the collateral-order doctrine. See Pet. App. 8a ("We see no need to create a new category of appealable collateral orders."). The court instead held that the FCA requires the United States to intervene in a *qui tam* suit before seeking dismissal, and it construed the government's Section 3730(c)(2)(A) motion to dismiss as including a request to intervene. See *id.* at 8a-23a. The court then concluded that precedents recognizing "the immediate appealability of a denial of intervention" supported its exercise of appellate jurisdiction here. *Id.* at 10a; see *id.* at 23a; see also *id.* at 31a (finding that denial of intervention on this record would be an abuse of discretion); *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 524-525 (1947) (suggesting that an abuse of discretion in denying a motion for permissive intervention is immediately appealable).

The court of appeals' ultimate conclusion that it possessed appellate jurisdiction here was correct. The government continues to believe, however, that the collateral-order doctrine provides the appropriate basis for that conclusion. The court of appeals based its jurisdictional holding on the established principle that a district court's denial of a motion for leave to intervene is immediately appealable. See Pet. App. 10a. But the government did not seek leave to intervene in this case, either before filing its Section 3730(c)(2)(A) motion, as part of that motion, or at any time thereafter.

The court below believed that, despite the absence of any government intervention motion, the United States' motion to dismiss should be "deemed" to incorporate a request for leave to intervene. Pet. App. 8a. The court based that conclusion on its views that (1) the government sought relief that was comparable in substance to the consequences of a successful intervention motion, see *id.* at 11a; and (2) the FCA requires the government to intervene before filing a Section 3730(c)(2)(A) motion, see *id.* at 12a, 22a. But treating the government as having intervened when it elected not to do so is contrary to the balance that Congress struck in the FCA, which gives the government a *choice* whether to seek party status. See *Eisenstein*, 556 U.S. at 933 ("Congress expressly gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status."). Moreover, the court of appeals' holding that the government must intervene in order to seek dismissal under Section 3730(c)(2)(A) is erroneous and contrary to the consensus view of other circuits. See Pet. App. 12a. Thus, if the Court grants certiorari in this case, the government will defend the Seventh Circuit's jurisdictional

holding based on the collateral-order doctrine, rather than on the rationale the court below articulated.

c. The Ninth Circuit recently held that a district court's denial of a Section 3730(c)(2)(A) motion to dismiss is not appealable under the collateral-order doctrine, and that the government must instead request certification to appeal under 28 U.S.C. 1292(b) or file a petition for a writ of mandamus. See *United States ex rel. Thrower* v. *Academy Mortg. Corp.*, 968 F.3d 996, 1009 (2020). The Seventh Circuit's decision to adjudicate the government's appeal here is inconsistent with the Ninth Circuit's dismissal of the government's appeal in *Thrower*. But the Seventh Circuit did not squarely rule on the government's collateral-order argument, finding that its own rationale obviated the need to decide that issue. See Pet. App. 8a. Conversely, the Ninth Circuit in *Thrower* "was not presented with and did not consider" the jurisdictional analysis that the court below embraced here. *Id.* at 9a n.2. There is consequently no square circuit conflict with respect to either of the two specific rationales that have been offered for the exercise of appellate jurisdiction here. Given the absence of such a conflict, the fact that the court of appeals here reached the correct ultimate conclusion, and the infrequency with which this jurisdictional issue arises, the first question presented does not warrant this Court's review.

2. The court of appeals correctly held that petitioner's FCA complaint should be dismissed in accordance with the government's request for that relief under Section 3730(c)(2)(A). That holding does not warrant further review.

As the D.C. Circuit has long recognized, the FCA is best read to preserve the Executive Branch's virtually

unfettered discretion to dismiss an action brought in the name of the United States to remedy a wrong done to the United States. See *Swift* v. *United States*, 318 F.3d 250, 252, cert. denied, 539 U.S. 944 (2003). The Ninth and Tenth Circuits have applied a slightly different standard, holding that the United States may dismiss a pending *qui tam* suit so long as there is a rational basis for that disposition. See *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999); *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir.), cert. denied, 546 U.S. 816 (2005). The Seventh Circuit here articulated a third variation of the dismissal standard, derived from the Act's good-cause standard for intervention and from provisions of the Federal Rules of Civil Procedure that govern plaintiffs' dismissal motions. See Pet. App. 23a-28a. As a practical matter, however, those variations in the standard are very unlikely to be outcome-determinative, and multiple courts have found that particular FCA complaints could be dismissed without deciding precisely what standard applies.

a. Section 3730(c)(2)(A)'s specification that an FCA suit may be dismissed by "'[t]he Government'"—"meaning the Executive Branch, not the Judicial"—"suggests the absence of judicial constraint." *Swift*, 318 F.3d at 252. That inference is strengthened by this Court's recognition that a decision not to prosecute is within "the special province of the Executive Branch," to which the Constitution assigns the responsibility to take care that the laws are faithfully executed. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985). A federal agency's "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally

committed to an agency's absolute discretion." *Id.* at 831. The "government's judgment" that a particular FCA claim alleging a wrong done to the United States should be dismissed under Section 3730(c)(2)(A) "amounts to" a similarly "unreviewable" exercise of prosecutorial decision, because "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 252-253.

Other FCA provisions reinforce the D.C. Circuit's conclusion. In contrast to Section 3730(c)(2)(A), the next subsection of the Act specifies particular criteria for courts to apply when the United States seeks to exercise control over *qui tam* suits "notwithstanding the objections of the" relator. 31 U.S.C. 3730(c)(2)(A) and (B). Under Section 3730(c)(2)(B), the government may *settle* a case only if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. 3730(c)(2)(B). Several other FCA provisions likewise contain standards for courts to apply in resolving various types of government motions that may impact *qui tam* relators.[2] Section 3730(c)(2)(A) places no similar

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[2] See 31 U.S.C. 3730(c)(2)(C) (court may limit a relator's participation after a "showing by the Government" that unrestricted participation would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment"); 31 U.S.C. 3730(c)(4) (court may stay discovery "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with" a related investigation or prosecution); *ibid.* (court may extend the stay "upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence" and that proposed discovery would interfere with other ongoing matters); 31 U.S.C. 3730(c)(3) (court may permit the government to

limitations on the government's authority to *dismiss* a case, and it does not articulate any substantive standards for a court to use to evaluate the government's dismissal decision. "Where Congress includes particular language in one section of a statute, but omits it in another section, * * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

While the court of appeals here framed the analysis slightly differently than the D.C. Circuit in *Swift*, that difference did not affect the outcome of this case. Like the D.C. Circuit, the court below held that the district court had plainly erred by refusing to defer to the government's justifications for dismissal stated in its Section 3730(c)(2)(A) motion. See Pet. App. 28a-29a.

b. Petitioner asserts (Pet. 11) that the court of appeals should have applied the standard endorsed by the Ninth and Tenth Circuits, which have instructed district courts to conduct a limited and highly deferential substantive review before granting the government's motion to dismiss a *qui tam* suit. In *Sequoia Orange*, the Ninth Circuit held that dismissal is justified if the government "(1) identifi[es] * * * a valid government purpose" and "(2) [shows] a rational relation between dismissal and accomplishment of the purpose." 151 F.3d at 1145 (citation omitted). "If the government satisfies the two-step test, the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Ibid.* (citation and internal quotation marks omitted). The Tenth Circuit has adopted

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intervene outside the seal period "upon a showing of good cause"); 31 U.S.C. 3730(b)(3) (court may extend the seal period "for good cause shown").

the Ninth Circuit's approach, at least for cases where the defendant has been served with the complaint. See *Ridenour*, 397 F.3d at 936.[3]

The Ninth Circuit's standard, which the court borrowed from decisions addressing "whether executive action violates substantive due process," *Sequoia Orange*, 151 F.3d at 1145, is flawed for the reasons described above and by the D.C. Circuit in *Swift*. But the narrow disagreement among the courts of appeals concerning the precise standard for evaluating Section 3730(c)(2)(A) motions made no difference to the outcome here, because dismissal of this complaint was warranted even under the standard that petitioner advocates. The Seventh Circuit "disagree[d] with the suggestion that the government's decision here fell short of the bare rationality standard borrowed by *Sequoia Orange* from substantive due process cases." Pet. App. 28a-29a. The court explained that the government had rationally determined, after a thorough investigation, that petitioner's suit could adversely impact federal healthcare programs because it targeted activity that is "beneficial to patients and the public." *Id.* at 29a. Judge Scudder issued a separate opinion in which he concluded that, "under the Ninth Circuit's standard, the government's dismissal request easily satisfied rational basis review, and the district court committed error concluding otherwise." *Id.* at 37a (Scudder, J., concurring in the judgment). "Wherever the limits of the government's power lie" in this context, "this case is not close to them." *Id.* at 28a (majority opinion).

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[3] The Tenth Circuit has reserved judgment on what standard applies when the government moves to dismiss an FCA case before the defendant has been served. See *United States ex rel. Wickliffe* v. *EMC Corp.*, 473 Fed. Appx. 849, 852-853 (2012).

Contrary to petitioner's contention (Pet. 18-21), the modest variations among the courts of appeals' standards for evaluating Section 3730(c)(2)(A) motions do not now (and may not ever) require this Court's standardization. All the courts of appeals that have considered the issue agree that government motions to dismiss under Section 3730(c)(2)(A) should receive substantial deference. Like the D.C. Circuit, the Seventh Circuit here concluded that Section 3730(c)(2)(A) imposes no substantive barriers to the United States' dismissal of a *qui tam* suit, but instead requires only the procedural steps of notice to the relator and an opportunity for a hearing. Pet. App. 24a (describing "[t]his procedural limit" as "the only authorized statutory deviation from [Federal Rule of Civil Procedure] 41"). And properly applied, the Ninth Circuit's standard for Section 3730(c)(2)(A) motions also gives the government wide latitude to dismiss an FCA case, comparable to the limited review that courts apply to substantive due process challenges to executive action. See *Sequoia Orange*, 151 F.3d at 1145.

Multiple courts have previously upheld government motions to dismiss FCA suits without choosing between the D.C. and Ninth Circuit standards described above. Those courts have recognized that both formulations are highly deferential and have concluded, in the cases before them, that the government would prevail under either one. The Second Circuit recently declined to choose between those approaches because the relator in the case before it "fail[ed] even the more stringent [*Sequoia Orange*] standard." *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, 837 Fed. Appx. 813, 816 (2020). The Third Circuit similarly found it unnecessary to resolve this issue because dismissal would be warranted "even [under] the more restrictive standard." *Chang* v.

Children's Advocacy Ctr. of Del. Weih Steve Chang, 938 F.3d 384, 387 (2019), cert. denied, 141 S. Ct. 243 (2020). A number of district courts have taken the same approach. See, *e.g.*, *United States ex rel. Graves* v. *Internet Corp. for Assigned Names & Numbers, Inc.*, 398 F. Supp. 3d 1307, 1310-1311 (N.D. Ga. 2019); *United States ex rel. Johnson* v. *Raytheon Co.*, 395 F. Supp. 3d 791, 794 (N.D. Tex. 2019); *United States ex rel. Stovall* v. *Webster Univ.*, No. 15-cv-3530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018). Indeed, in *Swift* itself the D.C. Circuit held in the alternative that, "[e]ven if [*Sequoia Orange*] set the proper standard, the government easily satisfied it." 318 F.3d at 254. Unless and until a case arises in which a court of appeals' choice between the *Swift* and *Sequoia Orange* standards appears to have affected the outcome, this Court's review is not warranted.

3. Petitioner's other criticisms of the decision below are both meritless and factbound.

a. Petitioner asserts (Pet. 12-14) that the court of appeals committed "manifest error" in finding that the government had adequately justified its dismissal of petitioner's FCA complaint. Pet. 14-15. That is incorrect. The government explained in detail its bases for determining that petitioner's complaint challenges conduct that is "appropriate and beneficial to federal healthcare programs and their beneficiaries." Pet. App. 29a & n.5; see D. Ct. Doc. 64, at 14 (explaining that the government's dismissal decision followed an "extensive investigation," including "consult[ations] with subject-matter experts" within the government "about [petitioner's] allegations and the applicability of regulatory safe harbors and government-issued industry guidance"). Petitioner does not substantiate its argument

(Pet. 14-15) that its interpretation of various governmental policy documents should be preferred to that of the government's own subject-matter experts. And in any event, petitioner's case-specific criticisms of the court of appeals' reasoning provide no basis for this Court's review.

b. Petitioner contends (Pet. 15-18) that the court of appeals violated procedural due-process principles by depriving it of a "meaningful hearing" before "divest[ing]" it of its "statutory interest" in this *qui tam* action. Pet. 16. That argument is flawed in several respects.

A relator has no constitutional right to pursue a claim for monetary relief that is premised on legal wrongs done to the federal government. While Congress has authorized relators to pursue such claims as partial assignees of the United States, relators' prerogatives under the FCA are subject to the limitations that the Act imposes, including the government's authority to dismiss the case.

Even if a relator's interest in an FCA suit could constitute a property interest protected by the Due Process Clause, petitioner acknowledges (Pet. 4) that the district court conducted an "extremely thorough hearing after reviewing briefs on the Government's motion to dismiss." The court of appeals' rejection of the district court's conclusions, and its determination that the district court had applied the wrong legal standard, does not show or even suggest that petitioner was denied meaningful "notice and an opportunity to be heard" on the Section 3730(c)(2)(A) motion. *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972) (describing the "fundamental" requirements of due process). Petitioner's due-process

argument simply restyles petitioner's misguided objections to the court of appeals' acceptance of the government's position that this FCA case warranted dismissal.

Petitioner describes the court of appeals as holding that "only exceptional cases will warrant a § 3730(c)(2)(A) hearing." Pet. 15. In fact, the court simply observed that the government's authority to dismiss a *qui tam* suit under Section 3730(c)(2)(A) may be limited by a court's power to prevent constitutional violations or fraud, and it stated that in "exceptional cases" Section 3730(c)(2)(A) hearings might bring such misconduct to light. Pet. App. 28a. The court did not hold that hearings are available *only* in such cases.

Petitioner asserts (Pet. 16) that the court of appeals' "acceptance of the Government's policy arguments at face value * * * raises procedural process concerns." But petitioner identifies no court that has accepted its suggestion that, whenever the government dismisses an FCA *qui tam* suit, it must disclose all of the evidence underlying its dismissal request. See Pet. 16-17 (citing *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959)). Such a requirement has no basis in the statutory text or in any court of appeals decision that has addressed the appropriate procedure for resolving a Section 3730(c)(2)(A) motion. See, *e.g.*, *Sequoia Orange*, 151 F.3d at 1145 (holding that, once the United States articulates a valid government purpose rationally related to dismissal of a pending *qui tam* suit, the relator must "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal") (citation and internal quotation marks omitted).

Finally, petitioner invokes (Pet. 17-18) Section 3730(c)(3), which provides that, "[w]hen a [relator] pro-

ceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). That provision does not assist petitioner here. Section 3730(c)(3) "instructs the district court not to limit the relator's 'status and rights' *as they are defined by* §§ 3730(c)(1) and (2)." Pet. App. 32a (emphasis added). Thus, once a court concludes that dismissal is appropriate under Section 3730(c)(2)(A), Section 3730(c)(3) poses no further barrier to dismissal. And even apart from that common-sense reading of Section 3730(c), petitioner does not explain its cursory suggestion that an asserted infringement of its rights under that provision would constitute either a Due Process Clause violation or the type of error that would warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021